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EXAMINER

MCCLENDON, SANZA L

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte THOMAS JOSEPH PECORINI,
AMIE ELIZABETH REAL, and EMERSON ESTON SHARPE JR.

Appeal 2008-001521
Application 10/050,680
Technology Center 1700

Decided:¹ July 07, 2009

Before EDWARD C. KIMLIN, BRADLEY R. GARRIS, and
MICHAEL P. COLAIANNI, *Administrative Patent Judges*.

KIMLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1, 3-5, 7, 9-11,

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the Decided Date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

13-15 and 18-25. We have jurisdiction under 35 U.S.C. § 6(b).

Claim 1 is illustrative:

1. A concentrate for coloring a base polyester comprising:
 - a) one or more colorants; and
 - b) from about 20 wt. % to about 80 wt. % of one or more copolymers comprising one or more of olefin/acrylate copolymer or olefin/methacrylate copolymer wherein the olefin component of the copolymer comprises from about 40 wt. % to about 99 wt. % of the copolymer and wherein the copolymer comprises one or more of:

ethylene methyl acrylate copolymers (EMA),
ethylene methyl methacrylate copolymers (EMMA), ethylene ethyl methacrylate copolymers (EEMA), ethylene butyl acrylate copolymers (EBA), or ethylene butyl methacrylate copolymers (EBMA);

wherein the wt. % is measured by total weight of the concentrate and wherein the concentrate does not comprise a low melt viscosity resin and provides a polyester composition having a moisture content of less than about 0.1 wt. % as measured by total weight of the polyester composition when the concentrate is combined with a base polyester.

The Examiner relies upon the following references in the rejection of the appealed claims (Ans. 3):

Tanaka (as translated)	JP 54129050 A	Oct. 06, 1979
Akao	EP 370424 B1	May 30, 1990

Appellants' claimed invention is directed to a concentrate for coloring a base polyester. The concentrate comprises one or more colorants and one or more of the recited copolymers. Also, the concentrate provides the polyester composition with a moisture content less than about 0.1 wt. %.

Appealed claims 10, 11, 13-15, and 18-25 stand rejected under 35 U.S.C. § 102(b) as being anticipated by JP '050 (Tanaka). Claims 1, 3, 10, 11, 13, 18-22, 24, and 25 stand rejected under 35 U.S.C. § 102(b) as being anticipated by EP '424 (Akao). Claims 1, 3-5, 7, and 9 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over JP '050 in view of EP '424, and claims 4, 5, 7, 9, 14, 15, and 23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over EP '424.

Appellants do not present separate arguments for any particular claim on appeal, nor do Appellants advance separate, substantive arguments against the Examiner's separate rejections. Accordingly, all the appealed claims stand or fall together with claim 1.

We have thoroughly reviewed each of Appellants' arguments for patentability. However, we are in complete agreement with the Examiner that the claimed subject matter is unpatentable over the cited prior art. Accordingly, we will sustain the Examiner's rejections for the reasons set forth in the Answer, and we add the following primarily for emphasis.

Appellants do not dispute the Examiner's factual determination that JP '050 and EP '424, like Appellants, describe a concentrate for coloring a base polyester comprising one or more colorants and one or more of the presently claimed olefin/acrylate copolymer or olefin/methacrylate copolymer. The sole argument advanced by Appellants is that neither reference discloses that the colored polyester composition has the claimed moisture content of less than about 0.1 wt. %. Indeed, both references are silent with respect to the moisture content of the colored polyester composition.

It is well settled that when a claim composition or product reasonably appears to be essentially the same as a composition or product disclosed by the prior art, the burden is on the applicant to demonstrate with objective evidence that the prior art composition or product does not possess properties attributed to the claimed composition or product. In the present case, although JP '050 and EP '424 are silent regarding the moisture content of the colored polyester composition, we agree with the Examiner that it is reasonable to conclude that the prior art compositions have a moisture level of less than about 0.1 wt. %.

As explained by the Examiner, both Appellants and the cited references use the same ingredients to formulate the colored polyester composition in the same manner, and Appellants' Specification does not set forth any particular method of achieving the claimed moisture level other than adding the color concentrate to the base polyester composition. No particular steps are disclosed in the present Specification for assuring that the moisture content of the polyester composition does not exceed 0.1 wt. %. Significantly, as emphasized by the Examiner, Appellants' Specification Example demonstrates that it is the addition of the claimed color concentrate, as opposed to the addition of prior art colorants, that produces the claimed moisture content in the base composition. Comparative Examples 3-6 in the Specification show that the addition of other prior art colorants results in a moisture content in excess of the claimed upper limit. Consequently, since JP '050 and EP '424 perform the same steps as exemplified by Appellants for making the colored polyester composition comprising the same components, it is eminently fair to place on Appellants the burden of establishing that the prior art colored polyester compositions

do not possess a moisture content within the claimed range. No such evidence, however, is of record.

As for the § 103 rejections, particularly the § 103 rejection of claim 1, we also find that it would have been obvious for one of ordinary skill in the art to formulate the colored compositions of JP '050 and EP '424 as having a moisture content within the claimed range. Appellants have proffered no evidence that they can achieve the claimed moisture level in any way not attainable by one of ordinary skill in the art following the teachings of JP '50 and EP '424.

In conclusion, based on the foregoing and the reasons well stated by the Examiner, the Examiner's decision rejecting the appealed claims is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a) (2008).

AFFIRMED

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